No. 15-145

In the Supreme Court of the United States

HUSKY INTERNATIONAL ELECTRONICS, INC.,
PETITIONER

v.

DANIEL LEE RITZ, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
SARAH E. HARRINGTON
Assistant to the Solicitor General
MICHAEL S. RAAB
MICHAEL SHIH
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

The Bankruptcy Code bars a debtor from discharging any "debt" "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by * * * false pretenses, a false representation, or actual fraud." 11 U.S.C. 523(a)(2)(A). The question presented is as follows:

Whether the "actual fraud" bar to discharge in Section 523(a)(2)(A) applies when the debtor has deliberately obtained money through a fraudulent-transfer scheme that was intended to cheat a creditor, even though the scheme did not involve the use of a false representation to induce the creditor to turn over money or property.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statutory provisions involved 2
Statement 2
Summary of argument 6
Argument:
The Bankruptcy Code's bar to discharge of a debt for money or property obtained by "actual fraud" encompasses debts for money or property that was obtained through intentionally fraudulent schemes that do not involve a false statement or false representation 10
A. When a debtor has obtained money by means of a fraudulent conveyance, acting with knowledge of the transferor's fraudulent intent, any debt associated with that money is non-dischargeable under Section 523(a)(2)(a) 11
1. At common law, the term "actual fraud" referred to intentional frauds, including schemes to transfer assets in order to thwart creditors' collection efforts, regardless of whether those schemes involved a false representation to the victim 12
2. If petitioner can establish the prerequisites to corporate veil-piercing under Texas law, respondent's debt to petitioner will be non-dischargeable under Section 523(a)(2)(A) 20
B. The structure and drafting history of the Bankruptcy Code's fraud provisions reinforce the conclusion that the term "actual fraud" extends beyond frauds involving false representations 24
C. The court of appeals' narrow interpretation of "actual fraud" in Section 523(a)(2)(a) undermines Congress's balance of competing policy objectives in the Bankruptcy Code 29
Conclusion 31
Appendix — Statutory provisions 1a

TABLE OF AUTHORITIES

Cases: Page

Ames v. *Moir*, 138 U.S. 306 (1891) 13
Bank of Marin v. *England*, 385 U.S. 99 (1996) 29
Bammer, In re, 131 F.3d 788 (9th Cir. 1997) 29
BFP v. *Resolution Trust Corp.*, 511 U.S. 531 (1994) 14
Brown v. *Felsen*, 442 U.S. 127 (1979) 30
Coder v. *Arts*, 213 U.S. 223 (1909) 14
Cohen v. *Cruz*, 523 U.S. 213 (1998) 10
Community for Creative Non-Violence v. *Reid*, 490 U.S. 730 (1989) 12
Field v. *Mans*, 516 U.S. 59 (1995) 6, 8, 12, 18, 19, 20
General Elec. Capital Corp. v. *Acosta*, 406 F.3d 367 (5th Cir. 2005) 6
Grogan v. *Garner*, 498 U.S. 279 (1991). 2, 10, 29, 30
Jennings, In re, 670 F.3d 1329 (11th Cir. 2012) 28
Kelly v. *Robinson*, 479 U.S. 36 (1986) 29, 30
Lawson, In re, 791 F.3d 214 (1st Cir. 2015) 17, 19, 21, 22, 29
Local Loan Co. v. *Hunt*, 292 U.S. 234 (1934) 30
McClellan v. *Cantrell*, 217 F.3d 890 (7th Cir. 2000) 13, 18, 21, 22
Neal v. *Clark*, 95 U.S. 704 (1877) 7, 12, 13
Parish v. *Murphree*, 54 U.S. (13 How.) 92 (1852) 15
Peters v. *Bain*, 133 U.S. 670 (1890) 14
Saylor, In re, 108 F.3d 219 (9th Cir. 1997) 29
Sexton v. *Wheaton*, 21 U.S. (8 Wheat.) 229 (1823) 15, 16
Stellwagen v. *Clum*, 245 U.S. 605 (1918) 2
Sumner v. *Hicks*, 67 U.S. (2 Black) 532 (1863) 13
Thompson v. *Baker*, 141 U.S. 648 (1891) 15, 16

Case—Continued: Page

Williams v. *United States Fid. & Guar. Co.*, 236 U.S. 549 (1915) 2

Statutes:

Act of Mar. 2, 1867, ch. 176, § 33, 14 Stat. 533 25
Act of July 1, 1898, ch. 541, 30 Stat. 544:
§ 17a(2), 30 Stat. 550 ..... 25, 30
§ 67e, 30 Stat. 564 14
Act of Feb. 5, 1903, ch. 487, § 5, 32 Stat. 798 25
Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (11 U.S.C. 101 *et seq.*) 26
§ 523, 92 Stat. 2590 26
11 U.S.C. 307 2
11 U.S.C. 523 ..... 2, 11
11 U.S.C. 523 note 12
11 U.S.C. 523(a) 29, 1a
11 U.S.C. 523(a)(2)(A) ..... *passim*, 1a
11 U.S.C. 523(a)(4) 4, 28, 29, 2a
11 U.S.C. 523(a)(6) 4, 28, 29, 2a
11 U.S.C. 523(a)(7) 30
11 U.S.C. 544(b) 20
11 U.S.C. 548(a)(1)(A) (§ 67d(2)(d)) 14, 17, 20, 27, 28, 3a
11 U.S.C. 727 28
11 U.S.C. 727(a)(2) 26, 27, 4a
11 U.S.C. 1328(a)(2) 29
Uniform Fraudulent Conveyance Act of 1918, § 7, 7A U.L.A. Pt. 2 (2006) 16
28 U.S.C. 581-589a 2
Tex. Bus. & Comm. Code Ann. (West 2015):
§ 24.005(a)(1) 22, 4a

Statutes—Continued: Page

§ 24.008(a)(1)-(3) 22
Tex. Bus. Orgs. Code Ann. § 21.223(b) (West 2012) 3, 5, 6, 23, 6a
13 Eliz. c. 5 ..... 13, 15

Miscellaneous:

4 *Collier on Bankruptcy* (Alan N. Resnik & Henry J. Sommer eds., 16th ed. 2015) 13
36 Cong. Rec. (1903):
pp. 1374-1375 26
p. 1375 26
1 Fowler V. Harper & Fleming James, Jr., *Law of Torts* (1956) 19
William L. Prosser, *Law of Torts* (4th ed. 1971) 19
3 Restatement (Second) of Torts (1977) 19
H.R. Rep. No. 595, 95th Cong., 1st Sess. (1977) 2, 26
S. Rep. No. 989, 95th Cong., 2d Sess. (1978) 26

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INTEREST OF THE UNITED STATES

The question presented in this case concerns the scope of the "actual fraud" bar to discharge in Section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. 523(a)(2)(A). The United States is the largest creditor in the Nation, and federal agencies frequently appear as creditors in bankruptcy cases. Congress has empowered a number of agencies to enforce federal statutory prohibitions on fraud. Those agencies invoke Section 523(a)(2)(A) in adversary proceedings to defend their monetary judgments from discharge in bankruptcy.

In addition, the Attorney General appoints United States Trustees, who are Justice Department officials, to supervise the administration of bankruptcy cases and to oversee trustees in regions comprising the vast majority of the federal judicial districts. 28 U.S.C.

581-589a. "The United States trustee may raise and may appear and be heard on any issue in any case or proceeding" brought under the Bankruptcy Code. 11 U.S.C. 307. United States Trustees "serve as bankruptcy watch-dogs to prevent fraud, dishonesty, and overreaching in the bankruptcy arena." H.R. Rep. No. 595, 95th Cong., 1st Sess. 88 (1977). Both as creditor and as superintendent of the bankruptcy system, the United States therefore has a substantial interest in this Court's resolution of the question presented.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-6a.

STATEMENT

1. The federal bankruptcy system is intended to give the honest but unfortunate debtor a fresh start while ensuring the maximum possible equitable distribution to creditors. See, *e.g.*, *Stellwagen* v. *Clum*, 245 U.S. 605, 617 (1918); *Williams* v. *United States Fid. & Guar. Co.*, 236 U.S. 549, 554-555 (1915). In balancing those sometimes competing goals, Congress has enacted various provisions that prevent or limit the discharge in bankruptcy of debts that arise from a debtor's fraudulent acts. Such provisions reflect Congress's evident determination that "creditors' interest in recovering full payment of [certain] debts * * * outweighed the debtors' interest in a complete fresh start." *Grogan* v. *Garner*, 498 U.S. 279, 287 (1991).

Section 523 of the Bankruptcy Code declares various categories of debts ineligible for discharge. 11 U.S.C. 523. As relevant here, Section 523 provides that a discharge under Chapter 7, 11, 12, or 13 of the Bankruptcy Code "does not discharge an individual debtor from any debt * * * for money, property, [or]

services, * * * to the extent obtained by * * * false pretenses, a false representation, or actual fraud." 11 U.S.C. 523(a)(2)(A). The question presented in this case concerns the scope of the "actual fraud" exception to discharge.

2. From 2003 to 2007, petitioner (a seller of electronic-device components) sold merchandise to Chrysalis Manufacturing Corporation. Pet. App. 2a. At all relevant times, respondent financially controlled Chrysalis, served as a director of Chrysalis, and owned at least 30% of Chrysalis's common stock. *Ibid.*

Chrysalis failed to pay for all of the items it had purchased from petitioner, accruing a debt of $163,999.38. Pet. App. 2a. During the relevant time period, Chrysalis also failed to pay other debts as they came due. *Id.* at 3a. While Chrysalis accrued such unpaid debts, respondent caused the corporation to transfer more than $1 million to seven other corporate entities, at least five of which respondent controlled in whole or in part. *Id.* at 2a. With respect to each of those transfers, Chrysalis did not receive reasonably equivalent value in exchange. *Id.* at 3a, 81a-82a.

3. Petitioner sued respondent in federal district court, seeking to hold him personally liable for the $163,999.38 debt that Chrysalis owed. Pet. App. 3a. Petitioner brought that claim under Section 21.223(b) of the Texas Business Organizations Code Annotated, under which a shareholder may be held liable for a corporation's contractual obligations if the shareholder "caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the holder." *Id.* at 36a (citation omitted). Respondent then filed a voluntary petition for Chapter 7 bank-

ruptcy in the Southern District of Texas. *Id.* at 3a. Petitioner initiated an adversary proceeding in the bankruptcy court, arguing, *inter alia*, that 11 U.S.C. 523(a)(2)(A) barred respondent from discharging his debt to petitioner because the debt was one "for money * * * obtained by * * * actual fraud."[1] *Ibid.*

a. After holding a trial, the bankruptcy court granted judgment for respondent. Pet. App. 78a-98a. The court found that respondent had "drained substantial funds out of Chrysalis's operating account and funneled these funds to other entities [he] controlled." *Id.* at 98a. The court further found that none of the disputed transfers had provided Chrysalis with "reasonably equivalent value," *id.* at 81a-82a, and that respondent was "not a credible witness" due to his "blatantly contradictory" attempts to explain his behavior and his "evasiveness and obfuscation" on the stand, *id.* at 83a-85a.

The bankruptcy court nevertheless held that petitioner was not entitled under Texas law to pierce the corporate veil and recover Chrysalis's debt from respondent. Pet. App. 90a-98a. The court observed that Texas law permits shareholder liability for a corporation's debt only when the shareholder has "perpe-

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[1] In addition to invoking Section 523(a)(2)(A), petitioner alleged that respondent's debt was non-dischargeable because it was "for fraud * * * while acting in a fiduciary capacity," 11 U.S.C. 523(a)(4), and because it was "for willful and malicious injury by the debtor to" petitioner or its property, 11 U.S.C. 523(a)(6). The bankruptcy court rejected both arguments. Pet. App. 93a-97a. Petitioner appealed the bankruptcy court's Section 523(a)(6) holding to the district court and the court of appeals, both of which affirmed. *Id.* at 17a-19a, 74a-77a. Petitioner did not seek this Court's review of that aspect of the court of appeals' decision. See Pet. i.

trate[d] an actual fraud" on the creditor. *Id.* at 91a (quoting Tex. Bus. Orgs. Code Ann. § 21.223(b) (West 2012)). The court found the record to be "wholly devoid" of evidence of what the court considered to be "the most crucial element for establishing actual fraud," *viz.* a false representation by the debtor to the creditor. *Id.* at 92a. The court also stated that "the tests for fraud under section 2[1].223 of [the Texas Business Organizations Code] and the requirements of section 523(a)(2)(A) of the [Bankruptcy] Code are virtually the same." *Ibid.* The bankruptcy court "conclude[d] that [petitioner's] common law fraud cause of action must fail and, therefore, [petitioner] may not prevail under [11 U.S.C.] 523(a)(2)(A)." Pet. App. 93a.

b. The district court reversed the bankruptcy court's state-law ruling. The court concluded that the showing of "actual fraud" that Texas law requires in order to pierce the corporate veil need not include proof of a misrepresentation. See Pet. App. 66a-72a. In holding that the Texas Business Organizations Code Annotated "applies here to impose liability on [respondent], individually," the district court relied on the bankruptcy court's finding that respondent had "caused Chrysalis to be used for the purpose of perpetrating and did perpetrate an actual fraud on its creditors primarily for [respondent's] direct personal benefit, i.e., he drained Chrysalis of funds and fraudulently transferred those funds to other entities under his control and/or ownership." *Id.* at 68a-69a.

The district court further held, however, that respondent's debt to petitioner did not fall within the exception to discharge in 11 U.S.C. 523(a)(2)(A). Pet. App. 72a-74a. The court relied on circuit precedent

holding that, for purposes of Section 523(a)(2)(A), "false pretenses, false representations[,] and actual fraud" have identical elements, one of which is a false representation. *Id.* at 72a-73a (citing *General Elec. Capital Corp.* v. *Acosta*, 406 F.3d 367, 372 (5th Cir. 2005)).

c. The court of appeals affirmed. Pet. App. 1a-20a. The court adhered to circuit precedent that had narrowly construed the term "actual fraud" in Section 523(a)(2)(A) to require proof that the debtor had made a false representation on which the creditor relied. See *id.* at 13a. The court acknowledged that such an interpretation renders the phrase "actual fraud" in Section 523(a)(2)(A) "redundant." *Id.* at 14a. The court of appeals reasoned, however, that this Court's decision in *Field* v. *Mans*, 516 U.S. 59 (1995), "[a]lthough not directly addressing the issue, appeared to assume that a false representation is necessary to establish 'actual fraud.'" Pet. App. 10a. In light of its holding as to dischargeability, the court of appeals declined to decide whether respondent had engaged in "actual fraud" within the meaning of Section 21.223(b) of the Texas Business Organizations Code. *Id.* at 6a.

SUMMARY OF ARGUMENT

The court of appeals held that the term "actual fraud" in 11 U.S.C. 523(a)(2)(A) is limited to illicit schemes involving false representations. That holding is contrary to the established understanding of the term "actual fraud" and to the structure and purposes of the Bankruptcy Code's non-dischargeability provisions.

A. Because the Code does not define the term "actual fraud," the Court should look to its established

common-law meaning. This Court held in *Neal* v. *Clark*, 95 U.S. 704, 709 (1877), that the term "fraud" in the bankruptcy context means positive fraud involving moral turpitude or intentional wrong. Congress's use of the term "actual fraud" in Section 523(a)(2)(A) is best understood to carry that meaning.

1. English and American courts have long viewed conveyances that are intended to delay or prevent collection of an existing debt as a species of fraud, even though such schemes usually do not involve a false representation. In 1571, British Parliament codified existing common law on fraudulent transfers by enacting the Statute of 13 Elizabeth, which voided conveyances made with the purpose or intent to delay, hinder, or defraud. More than a century ago, this Court described the standard set forth in that law as requiring proof of "actual fraud." In construing the various fraud provisions that Congress has included in bankruptcy statutes stretching back to the Nineteenth Century, this Court has never suggested that the requisite intent to defraud may be established only with proof that a false representation induced a creditor to part with money or property.

By the time Congress enacted the Bankruptcy Code in 1978, it was well established that the term "actual fraud" in this context encompassed schemes that do not employ a false representation, including fraudulent-transfer schemes. The courts often applied that principle to determine whether transferred property should be returned to the estate, rather than (as here) in determining whether any debt the transferee incurred as a result of the scheme was dischargeable. Those authorities nevertheless bear directly on the proper construction of Section

523(a)(2)(A), because they reflect the longstanding recognition by legislatures and this Court that a conveyance intended to cheat a creditor is a form of "actual fraud." When a transferee shares the transferor's intent to hinder, delay, or defraud the transferor's creditor, the money or property the complicit transferee receives is "obtained by * * * actual fraud" within the meaning of Section 523(a)(2)(A), regardless of whether the scheme involves a false representation to the creditor.

The court of appeals' reliance on this Court's decision in *Field* v. *Mans*, 516 U.S. 59 (1995), was misplaced. Because the creditors in *Field* alleged that the debtors had used false representations to obtain credit, the Court focused on the common-law rules governing (and particularly on the degree of reliance needed to establish) that *type* of fraudulent scheme. The Court's analysis does not suggest that a false representation is an essential prerequisite to *every* form of "actual fraud."

2. In a typical fraudulent-conveyance case, the transferor attempts to cheat his creditors by creating the appearance that he lacks sufficient assets to pay his debt and obtaining a discharge of that debt in bankruptcy. State fraudulent-conveyance laws often create a cause of action against a transferee who knowingly participates in a fraudulent-transfer scheme. Where state law renders the complicit transferee liable, the transferee's resulting debt is one for money or property "obtained by * * * actual fraud" within the meaning of Section 523(a)(2)(A) and therefore is non-dischargeable.

In this case, petitioner seeks to hold respondent personally liable for a debt owed by Chrysalis, the

transferor corporation that respondent controlled. In order to establish the Texas-law prerequisites to piercing Chrysalis's corporate veil, however, petitioner must show that respondent used the transferred funds for his direct personal benefit, by sending them to other corporations that he controlled. If petitioner can establish that prerequisite to state-law liability, respondent's debt is correctly viewed as one for money "obtained by * * * actual fraud." In holding to the contrary, the court of appeals did not consider whether respondent should be viewed as the transferee or transferor. Rather, the court employed an incorrectly limited view of "actual fraud" that would apply equally to the more typical case in which the debtor seeking a bankruptcy discharge is solely the recipient of a fraudulent conveyance.

B. Section 523(a)(2)(A) identifies "actual fraud" and "a false representation" as separate bases for denying discharge. That language reinforces the conclusion that "actual fraud" is not limited to schemes involving a "false representation." The court of appeals inferred that, because other provisions in the Code address (or may address) fraudulent transfers, Congress could not have intended fraudulent-transfer schemes to be covered by Section 523(a)(2)(A). That reasoning was faulty. The provisions on which the court relied address different problems, and they will not be rendered superfluous if Section 523(a)(2)(A) is construed to encompass fraudulent-transfer schemes. And the *possibility* of some overlap between different non-dischargeability rules provides no sound basis for rejecting the established meaning of the term "actual fraud."

C. Section 523(a)(2)(A) reflects Congress's policy determination that an individual who owes a debt for money or property obtained by fraud is not the type of honest but unfortunate debtor who is entitled to the benefits of the bankruptcy system. That determination reflects the broader understanding that equitable principles govern the exercise of bankruptcy jurisdiction, and that a creditor's right to recovery is paramount in the face of a debtor's dishonesty. Correctly interpreting Section 523(a)(2)(A) to apply to fraudulent-transfer schemes protects creditors without burdening honest debtors.

ARGUMENT

THE BANKRUPTCY CODE'S BAR TO DISCHARGE OF A DEBT FOR MONEY OR PROPERTY OBTAINED BY "ACTUAL FRAUD" ENCOMPASSES DEBTS FOR MONEY OR PROPERTY THAT WAS OBTAINED THROUGH INTENTIONALLY FRAUDULENT SCHEMES THAT DO NOT INVOLVE A FALSE STATEMENT OR FALSE REPRESENTATION

"The Bankruptcy Code has long prohibited debtors from discharging liabilities incurred on account of their fraud, embodying a basic policy animating the Code of affording relief only to an 'honest but unfortunate debtor.'" *Cohen* v. *Cruz*, 523 U.S. 213, 217 (1998) (quoting *Grogan* v. *Garner*, 498 U.S. 279, 287 (1991)). Section 523(a)(2)(A) of the Bankruptcy Code prohibits the discharge of "any debt" for, *inter alia*, money or property to the extent such money or property was "obtained by * * * false pretenses, a false representation, or actual fraud." 11 U.S.C. 523(a)(2)(A); see *Cohen*, 523 U.S. at 218-219 ("Once it is established that specific money or property has

been obtained by fraud, * * * 'any debt' arising therefrom is excepted from discharge.").

The court of appeals held that, even assuming that petitioner can satisfy the Texas-law requirements to pierce the corporate veil and hold respondent personally liable for Chrysalis's contractual obligations, Section 523(a)(2)(A) does not preclude discharge of respondent's debt because the fraudulent scheme alleged in this case did not involve any false representation to petitioner. That holding is erroneous. Dishonest transfers used to hinder or defeat creditors' efforts to collect debts from the transferor have long been viewed as a species of "actual fraud." Section 523(a)(2)(A) is properly construed, in light of its text and history, to incorporate that traditional understanding.

A. When A Debtor Has Obtained Money By Means Of A Fraudulent Conveyance, Acting With Knowledge Of The Transferor's Fraudulent Intent, Any Debt Associated With That Money Is Non-dischargeable Under Section 523(a)(2)(A)

Section 523 of the Bankruptcy Code prevents discharge in bankruptcy of a debt for money or property to the extent the money or property was obtained by "false pretenses, a false representation, or actual fraud." 11 U.S.C. 523(a)(2)(A). The court of appeals held that "actual fraud" within the meaning of that provision can occur only if the debtor makes a false representation to the creditor. Pet. App. 6a-7a. Respondent elaborates on that standard, arguing that a debtor's actions qualify as "actual fraud" only if the debtor employed a false statement or misrepresentation to induce a creditor to part with money or property. Br. in Opp. 16-21. That interpretation is incorrect.

1. At common law, the term "actual fraud" referred to intentional frauds, including schemes to transfer assets in order to thwart creditors' collection efforts, regardless of whether those schemes involved a false representation to the victim

Although the Bankruptcy Code does not define the term "actual fraud," this Court has "construe[d] the terms in § 523(a)(2)(A) to incorporate the general common law of torts." *Field* v. *Mans*, 516 U.S. 59, 70 n.9 (1995). The Court in *Field* explained more generally that, when "Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise indicates, that Congress meant to incorporate the established meaning of these terms." *Id.* at 69 (quoting *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 739 (1989)). Contrary to the court of appeals' conclusion, that interpretive methodology does not support the view that "actual fraud" requires the use of false representations.

a. From its inception, American bankruptcy law has incorporated the concept of fraud for various purposes. In *Neal* v. *Clark*, 95 U.S. 704, 709 (1877), this Court held that the term "fraud," as used in the bankruptcy context, "means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, * * * and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality." When Congress enacted the Bankruptcy Code in 1978, the drafters explained that Section 523(a)(2)(A) "is intended to codify current case law, e.g., *Neal* v. *Clark*, which interprets 'fraud' to mean actual or positive fraud rather than fraud implied in law." 11 U.S.C. 523 note (citation omitted); see

McClellan v. *Cantrell*, 217 F.3d 890, 894 (7th Cir. 2000) (noting that the term "fraud in fact" is synonymous with "actual fraud"). Thus, an actual fraud for purposes of Section 523(a)(2)(A) is a fraud "involving moral turpitude or intentional wrong." *Neal*, 95 U.S at 709; accord *Ames* v. *Moir*, 138 U.S. 306, 311 (1891).

b. "Actual fraud" at common law was not limited to schemes involving the use of false representations to induce the victim to part with money or property. The essence of a common-law scheme to defraud is the use of deceit to cheat another. See 4 *Collier on Bankruptcy* ¶ 523.08[1][e], at 523-7 (Alan N. Resnik & Henry J. Sommer eds., 16th ed. 2015). Although such schemes *usually* involve the use of false representations to acquire money or property from the victim, the concept of actual fraud has not been limited to that form of illicit conduct. For centuries, English and American courts and legislatures have understood the universe of intentional (*i.e.*, actual) frauds to include conveyances that are intended to delay or prevent collection of existing debts. As the terms "fraudulent transfer" and "fraudulent conveyance" indicate, such schemes have traditionally been viewed as a species of fraud even though they typically do not involve misrepresentations to, or attempts to acquire additional money or property from, the creditors who are their victims.

In 1571, British Parliament enacted the Statute of 13 Elizabeth, which included an "Acte agaynst fraudulent Deedes Gyftes Alienations, &c." that voided "faigned covenous and fraudulent * * * Conveyaunces" made with the "Purpose and Intent to delaye hynder or defraude." 13 Eliz c. 5. That statute codified the English courts' common-law rule with respect to fraudulent conveyances, see *Sumner* v.

Hicks, 67 U.S. (2 Black) 532, 533-534 (1863), a rule that was later "universally adopted in American law as the basis of [the Nation's] jurisprudence on that subject," *Peters* v. *Bain*, 133 U.S. 670, 685 (1890). "English courts soon developed the doctrine of 'badges of fraud': proof by a creditor of certain objective facts (for example, a transfer to a close relative, a secret transfer, a transfer of title without transfer of possession, or grossly inadequate consideration) would raise a rebuttable presumption of actual fraudulent intent." *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 540-541 (1994) (citation omitted). More than a century ago, the Court described the standard set forth in the Statute of 13 Elizabeth as requiring proof of "actual fraud." *Coder* v. *Arts*, 213 U.S. 223, 242 (1909) (construing Section 67e of the Bankruptcy Act of 1898); see *BFP*, 511 U.S. at 541 (explaining that "the 1898 Act specifically adopted the language of the Statute of 13 Elizabeth").[2]

c. "Every American bankruptcy law has incorporated a fraudulent transfer provision." *BFP*, 511 U.S. at 541. When inquiring whether a debtor (or a defendant in a non-bankruptcy proceeding) had engaged in a fraudulent conveyance, this Court has never suggested that the requisite intent to defraud may be proved only through evidence that a false representa-

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[2] When the Court decided *Coder*, Section 67e of the Bankruptcy Act of 1898 authorized avoidance of transfers made "with the intent and purpose * * * to hinder, delay, or defraud" creditors. Act of July 1, 1898, ch. 541, § 67e, 30 Stat. 564. That language was later moved to Section 67d(2)(d), and other provisions were added to make other transfers avoidable as fraudulent in law. The provision authorizing avoidance of transfers made "to hinder, delay, or defraud" a creditor is now codified at 11 U.S.C. 548(a)(1)(A).

tion induced (or was intended to induce) a creditor to part with money or property. Rather, the Court has examined the particulars of each case to discern whether the transfer was intended to cheat the creditor.

In *Thompson* v. *Baker*, 141 U.S. 648 (1891), for example, this Court interpreted a state fraudulent-conveyance statute similar to the Statute of 13 Elizabeth. *Id.* at 650. The defendant had conveyed real property to his nephew for no consideration at a time when the defendant owed $10,000 to the plaintiff. *Id.* at 648-649. The Court held that the fraudulent-conveyance statute voided the transfer (and that the plaintiff therefore had a $10,000 lien on the property when the nephew took ownership) because the "transaction" transferring title "was a mere sham" that was "made with the intent to defraud the creditors of the grantor." *Id.* at 654. Similarly in *Parish* v. *Murphree*, 54 U.S. (13 How.) 92 (1852), the Court held that a man's conveyance of property to his wife at a time when his debts exceeded his remaining assets was void under a state fraudulent-conveyance statute. The Court reached that conclusion, not because the debtor had made a false representation to his creditors, but because "no prudent man with an honest purpose and a due regard to the rights of his creditors, could have made the settlement." *Id.* at 100.

In interpreting American common-law and statutory bans on fraudulent conveyances, this Court (like its English forebears) has looked for "badges of fraud" to discern whether a debtor had the requisite state of mind—*i.e.*, whether he committed "actual fraud." In *Sexton* v. *Wheaton*, 21 U.S. (8 Wheat.) 229 (1823), for example, the Court considered the validity

of a debtor's transfer of property to his wife in the face of a creditor's demand that the property be sold to satisfy the husband's debts. *Id.* at 238-239. After noting that the debtor's wife had neither made false representations nor countenanced any false representations by her husband, the Court inquired whether "any badges of fraud attend[ed]" the transfer. *Id.* at 250-251 (considering, *inter alia*, the "proportional magnitude of the [assets] conveyed" and the "short period" between the transfer and the failure of the debtor's business). The Court declined to invalidate the transfer only after weighing those relevant facts—an exercise that would have been unnecessary if "actual fraud" required a false representation. The Court followed a similar path in *Thompson*, invalidating a fraudulent transfer "made with the intent to defraud the creditors of the grantor" despite the absence in the record of proof of any false representation. 141 U.S. at 648-649, 654.

d. Thus, by the time Congress enacted the Bankruptcy Code in 1978, it was well established that the term "actual fraud" in this context encompassed schemes that do not employ false representations, and specifically transfers undertaken with the intent to cheat creditors by thwarting their collection efforts.[3] To be sure, the statutory provisions addressed in those cases typically authorized trustees to avoid and

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[3] In addition, the Uniform Fraudulent Conveyance Act of 1918 included a section titled "Conveyance Made With Intent to Defraud," which provided that "[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." § 7, 7A U.L.A. Pt. 2, at 378 (2006).

thereby recover fraudulent transfers made by the debtor in bankruptcy. Provisions like the current 11 U.S.C. 548(a)(1)(A), which define the circumstances under which such transfers may be avoided and the relevant property returned to the estate, do not speak to the distinct question whether any debt the *transferee* may owe as a result of such schemes is dischargeable if the transferee seeks bankruptcy relief. Those provisions (and this Court's decisions construing them) nevertheless bear directly on the question presented here, because they reflect the longstanding recognition by Congress and the Court that conveyances intended to cheat creditors are a form of "actual fraud."

In one significant respect, the inquiry under Section 523(a)(2)(A) differs from the inquiry under provisions like Section 548(a)(1)(A), which authorizes the trustee to avoid certain transfers made "with actual intent to hinder, delay, or defraud" creditors. Cases may arise in which a debtor transfers money or property with the intent to cheat his creditors, but the recipient is unaware of that purpose and therefore is not complicit in the fraud. Such transfers (if carried out within the two-year period before the filing of the bankruptcy petition) are covered by Section 548(a)(1)(A), which focuses on the intent with which the transfer was "made." Section 523(a)(2)(A), by contrast, refers to money or property "obtained by * * * actual fraud." That provision is triggered only if the *transferee* (the person who has "obtained" the money or property) acted with fraudulent intent. See *In re Lawson*, 791 F.3d 214, 222 (1st Cir. 2015) ("We hold that the fraud exception to discharge codified at § 523(a)(2)(A) continues to bar from discharge debts

incurred through knowing and intentional receipt of fraudulent conveyances."), petition for cert. pending, No. 15-113 (filed July 24, 2015); *McClellan*, 217 F.3d at 894-895. But the fact that the transferee's intent is crucial under Section 523(a)(2)(A) does not mean that a *different* intent is required. The requisite fraudulent intent may be established through proof that the transferee understood and shared the transferor's purpose of evading collection of the transferor's debt, regardless of whether any false representation to creditors was used to carry out the scheme.

e. In concluding that "actual fraud" is limited to fraudulent schemes employing a false representation, the court of appeals relied in large part on this Court's decision in *Field* v. *Mans*, *supra*. Pet. App. 9a-13a. The debtor in *Field* had made false representations to induce others to extend him credit. 516 U.S. at 61-63. The question before the Court concerned the degree of reliance on the false representations that the creditors were required to show in order to establish that the associated debt was non-dischargeable under Section 523(a)(2)(A). *Id.* at 63, 66. The Court looked to the common-law concept of "actual fraud" involving false representations to answer that question, concluding that, at common-law, such fraudulent schemes required justifiable reliance (rather than the more demanding reasonable reliance) to qualify as actual fraud. *Id.* at 69-76.

Because the creditors in *Field* had alleged a fraudulent scheme involving false representations, the Court looked to discussions in common-law and secondary sources of the circumstances under which misrepresentations will give rise to liability for fraud. 516 U.S. at 70-72. The court below viewed this Court's

focus on those discussions as indicating that a misrepresentation is an essential element of "actual fraud." Pet. App. 11a-12a. The more natural inference, however, is that the Court, in seeking to identify the relevant common-law rule, focused specifically on the law governing liability for false representations because that was the type of fraud alleged in the case. See, *e.g.*, 3 Restatement (Second) of Torts §§ 537, 540, 541, 545A, at 80, 88, 100 (1977) (in chapter on "Fraudulent Misrepresentation"); William L. Prosser, *Law of Torts* § 108, at 714 (4th ed. 1971) (in chapter on "Misrepresentation"); 1 Fowler V. Harper & Fleming James, Jr., *Law of Torts* § 7.12, at 580 (1956) (in chapter on "Misrepresentation and Nondisclosure") (all cited in *Field*, 516 U.S. at 70-72). Nothing in the scholarly works on which the Court relied suggests that the term "actual fraud" is limited to frauds involving false representations. See *Lawson*, 791 F.3d at 219 (noting that "the common law concept of 'fraud' as distilled by the Restatement to which the Court [in *Field*] directs us extends beyond fraudulent misrepresentations to at least include fraudulent conveyances").

The inference drawn by the court of appeals in this case is particularly unwarranted in light of the reason the *Field* Court gave for treating the historical materials as relevant to its interpretation of Section 523(a)(2)(A). The Court in *Field* noted and relied on the established interpretive principle that statutory terms with a common-law ancestry will be given their common-law meaning unless Congress has manifested a contrary intent. See 516 U.S. at 67. The Court's focus on the level of reliance required for "actual fraud" in common-law misrepresentation cases was simply one application of that general interpretive

rule. See *id.* at 67-68. As explained above, abundant historical evidence makes clear that common-law "actual fraud" extended beyond schemes involving false representations and encompassed conveyances designed to cheat creditors by hindering their collection efforts. To read *Field* as giving the term a narrower meaning within the context of Section 523(a)(2)(A) would turn the decision against itself.

2. If petitioner can establish the prerequisites to corporate veil-piercing under Texas law, respondent's debt to petitioner will be non-dischargeable under Section 523(a)(2)(A)

In a classic fraudulent-transfer scheme, an individual who owes a debt transfers an asset to a known individual for little or no consideration, with the intent either to reclaim the asset later or to allow the known transferee (instead of the creditor) to use the asset. Such transfers may impede collection efforts by creating the appearance that the transferor lacks sufficient assets to pay his creditor. If the transferor files a petition for bankruptcy and his fraudulent transfer is not discovered, he will obtain a discharge of his debt unless the Bankruptcy Code exempts the creditor's claim from discharge. And while the Code authorizes bankruptcy trustees to avoid certain fraudulent transfers, that power exists only with respect to transfers made within the two-year period before the bankruptcy petition was filed. See 11 U.S.C. 548(a)(1)(A).[4]

In many fraudulent-conveyance cases, a creditor seeks to recover what it is due by pursuing a remedy

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[4] In addition, 11 U.S.C. 544(b) authorizes a trustee to bring a fraudulent-transfer claim when authorized by state law, which may afford a longer limitations period.

against the transferee (who was enriched by the transfer) rather than against the transferor (whom the transfer may have rendered judgment-proof). Such a remedy may be available under a state fraudulent-conveyance statute or similar law, particularly if the transferee participated in the conveyance with the intent to assist the transferor in cheating the creditor. If the transferee seeks a discharge in bankruptcy of that state-law debt, the creditor may argue that the debt is non-dischargeable under 11 U.S.C. 523(a)(2)(A) because it is one for money or property "obtained by * * * actual fraud."

In the other court of appeals cases that gave rise to the circuit split on the question presented here, the affected creditor sought monetary relief from the recipient of an allegedly fraudulent conveyance, that transferee then filed a bankruptcy petition, and the creditor argued in the bankruptcy case that the transferee's debt was non-dischargeable under Section 523(a)(2)(A). See *Lawson*, 791 F.3d at 216-217; *McClellan*, 217 F.3d at 892. In *McClellan*, for example, the creditor (McClellan) alleged that the debtor had transferred machinery to his sister for $10; that the sister "in accepting the transfer of the machinery was colluding with her brother to thwart McClellan's collection of the debt that her brother owed him"; and that the sister "turned around and sold the machinery for $160,000—and she's not telling anyone what has happened to that money." 217 F.3d at 892. The Seventh Circuit held that, if McClellan could prove his allegations, any debt the sister owed him under Illinois's fraudulent-conveyance statute would be non-dischargeable under Section 523(a)(2)(A). See *id.* at 892-895. In holding that the alleged scheme would

constitute "actual fraud" within the meaning of that provision, the court observed that "[t]he two-step routine that McClellan alleges * * * —in which Debtor A transfers valuable property to B for nothing in order to keep it out of the hands of A's creditor and B then sells the property and declares bankruptcy in an effort to shield herself from liability for having colluded with A to defeat the rights of A's creditor—is as blatant an abuse of the Bankruptcy Code as we can imagine." *Id.* at 893.[5]

In both *Lawson* and *McClellan*, creditors asserted state-law claims against transferees who were alleged to have received property from their relatives with knowledge of the transferors' illicit intent. See *Lawson*, 791 F.3d at 216-217; *McClellan*, 217 F.3d at 892-893. Petitioner's state-law claim against respondent rests on a somewhat different conceptual footing. Petitioner sought to hold respondent personally liable for Chrysalis's breach of contract by piercing Chrysalis's corporate veil. See J.A. 88-98 (adversary complaint). Texas law permits corporate veil-piercing

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[5] Texas law provides that a transfer made by a debtor is fraudulent as to a creditor when, *inter alia*, the transfer is made "with actual intent to hinder, delay, or defraud any creditor of the debtor." Tex. Bus. & Comm. Code Ann. § 24.005(a)(1) (West 2015). A creditor who establishes that such a fraudulent transfer has occurred is entitled under Texas law to various remedies, including avoidance of the transfer, "an attachment or other provisional remedy against the asset transferred or other property of the transferee," or "any other relief the circumstances may require." *Id.* § 24.008(a)(1)-(3). Under those provisions, petitioner might have been able to establish a state-law right to monetary relief from the corporations to which Chrysalis transferred its assets, and potentially from respondent in his personal capacity by piercing the veils of those corporations.

when "a holder, beneficial owner, subscriber, or affiliate" of a corporation has "caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the holder, beneficial owner, subscriber, or affiliate." Tex. Bus. Orgs. Code Ann. § 21.223(b) (West 2012). Insofar as petitioner sought to hold respondent personally liable for Chrysalis's debt, based on respondent's status as Chrysalis's controlling officer, the suit might reasonably be viewed as one against respondent in his capacity as *transferor*. Because Section 523(a)(2)(A) applies to debts for money or property that is "obtained by" fraud, it would not ordinarily encompass any liability that the transferor might incur as a result of his participation in a fraudulent-transfer scheme.

In order to pierce Chrysalis's corporate veil under Texas law, however, petitioner was required to establish that the transfers were made "primarily for the direct personal benefit of" respondent himself. Tex. Bus. Orgs. Code Ann. § 21.223(b) (West 2012); see Pet. App. 69a. To make that showing, petitioner sought to demonstrate that respondent diverted Chrysalis's funds to other corporations that respondent controlled. Petitioner's state-law claim thus depends on the allegation that respondent was, as a practical matter, the recipient as well as the transferor of the fraudulently-conveyed funds. If petitioner's evidence is sufficient to establish the requirements for corporate veil-piercing under Section 21.223(b) of the Texas Business Organizations Code Annotated, so that respondent can be held liable under Texas law for Chrysalis's breach of contract, respondent's own debt is properly characterized as one for money "obtained

by * * * actual fraud" within the meaning of 11 U.S.C. 523(a)(2)(A).

In any event, the court of appeals did not find Section 523(a)(2)(A) to be inapplicable here because petitioner's state-law suit was filed against respondent in his capacity as transferor. Rather, the court held that "actual fraud" within the meaning of Section 523(a)(2)(A) requires a false representation. That rationale would apply equally to the more typical case where the debtor who seeks a bankruptcy discharge is solely the recipient of an allegedly fraudulent transfer, and it is erroneous for the reasons set forth above.

B. The Structure And Drafting History Of The Bankruptcy Code's Fraud Provisions Reinforce The Conclusion That The Term "Actual Fraud" Extends Beyond Frauds Involving False Representations

1. The full text of Section 523(a)(2)(A) confirms that the term "actual fraud" is not limited to frauds involving false representations. That provision states that debts for money or property that is obtained by (1) "false pretenses," (2) "a false representation," or (3) "actual fraud" are non-dischargeable in bankruptcy. 11 U.S.C. 523(a)(2)(A). If the phrase "actual fraud" were limited to schemes involving false representations, Congress's addition of that phrase in 1978 would have served no useful purpose, because the Bankruptcy Code specifically precludes discharge of debts for money or property obtained by "a false representation."

2. American bankruptcy law has long barred debtors from discharging debts arising from fraud. Throughout that history, Congress has treated "fraud" and "false representations" as distinct rather than synonymous terms. The court of appeals' con-

struction of Section 523(a)(2)(A) ignores that established practice.

In the Bankruptcy Act of 1867, Congress provided that "no debt created by the fraud or embezzlement of the bankrupt * * * shall be discharged under this act." Act of Mar. 2, 1867, ch. 176, § 33, 14 Stat. 533. In replacing that law with the Bankruptcy Act of 1898, Congress narrowed the range of fraud-related debts that are exempt from discharge to those that had been reduced to "judgments in actions for frauds," and it added a new category of non-dischargeable debts, *viz.* "judgments in actions for * * * obtaining property by false pretenses." Act of July 1, 1898, ch. 541, § 17a(2), 30 Stat. 550 (precluding discharge of debts that "are judgments in actions for frauds, or obtaining property by false pretenses or false representations"). The expansion of the prohibition to cover judgments for obtaining property by false pretenses would have been unnecessary if every judgment for a "fraud[]" is necessarily a judgment for obtaining property by false representation.

Congress's 1903 amendment to the bankruptcy law confirms that Congress viewed the category of debts related to acts of fraud as broader than the category of debts related to obtaining property by false representations. In that amendment, Congress removed the requirement that a non-dischargeable debt be reduced to a judgment, while simultaneously eliminating the explicit prohibition on discharging debts based on fraud (except where the debtor was acting as a fiduciary). Act of Feb. 5, 1903, ch. 487, § 5, 32 Stat. 798 ("A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as

* * * are liabilities for obtaining property by false pretenses or false representations").[6]

The explicit reference to "fraud" in the discharge bar did not return to American bankruptcy law until Congress enacted the Bankruptcy Reform Act of 1978 (1978 Act), Pub. L. No. 95-598, 92 Stat. 2549. The 1978 Act replaced former Section 17a(2) with 11 U.S.C. 523(a)(2)(A), which remains in place today with only minor stylistic revisions. 92 Stat. 2590. The new Section 523 harkens back to the Bankruptcy Act of 1898 by separately precluding discharge of debts related to "actual fraud" and debts related to "a false representation." The congressional reports accompanying the enactment explained that, as a result of the changes, "'actual fraud' is added as a ground for exception from discharge." S. Rep. No. 989, 95th Cong., 2d Sess. 78 (1978); accord H.R. Rep. No. 595, 95th Cong., 1st Sess. 364 (1977). That characterization of the amendment's effect confirms what would in any event be the natural inference from the statutory text, *viz.* that "actual fraud" is not synonymous with (or a subset of) "false representation."

3. The court of appeals in this case drew a different inference from the larger statutory context. The court observed that "another provision of the Bankruptcy Code, Section 727(a)(2), excepts from dis-

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[6] At the time, the exclusion of debts related to fraud from the bar on discharge drew criticism from at least one Member of Congress, who argued that the deletion could "permit[] a discharge in bankruptcy where the indebtedness was incurred by fraud." 36 Cong. Rec. 1374-1375 (1903) (statement of Rep. Mann). When a colleague assured him that such debts were covered by the reference to "false pretenses or false representations," the objector responded that "there are many other frauds, of course, besides false pretenses and false representations." *Id.* at 1375.

charge certain fraudulent transfers." Pet. App. 16a. The court stated that "[i]t would appear odd, at the very least, for Congress to have intended that the 'actual fraud' provision cover fraudulent transfers, when there is another provision directly addressing such transfers." *Ibid.* That analysis reflects a misunderstanding of the distinct purposes served by Sections 523(a)(2)(A) and 727(a)(2) within the overall statutory scheme.

Section 727(a)(2) bars a debtor from discharging *any* of his debts if he "has transferred, removed, destroyed, mutilated, or concealed" his property "with intent to hinder, delay, or defraud a creditor" during the one-year period before the bankruptcy petition is filed. 11 U.S.C. 727(a)(2). Even with respect to the fraudulent transferor of property, Section 727(a)(2) provides creditors no protection if more than one year elapses between the fraudulent transfer and the debtor's bankruptcy filing. More importantly for present purposes, Section 727(a)(2) imposes no sanction on a *transferee* who knowingly and intentionally participates in a fraudulent-conveyance scheme and later files for bankruptcy. Section 523(a)(2)(A), by contrast, refers to debts for money or property that is "obtained by * * * actual fraud," language reflecting a particular focus on the debts of the transferee. See pp. 17-18, *supra*. There is nothing anomalous about Congress's enactment of distinct provisions specifying the consequences of a fraudulent-transfer scheme for the maker and recipient of a fraudulent conveyance.[7]

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[7] As discussed above, Section 548(a)(1)(A) permits a bankruptcy trustee to "avoid any transfer * * * of an interest of the debtor in property * * * that was made * * * within 2 years before the date of the filing of the petition, if the debtor voluntarily or invol-

The court of appeals also stated that "other exceptions to discharge in the Bankruptcy Code may be rendered redundant" if Section 523(a)(2)(A) is construed to reach debts arising out of fraudulent-transfer schemes. Pet. App. 16a. The court cited Section 523(a)(4), which excepts from discharge any debt for "fraud or defalcation while acting in a fiduciary capacity," and Section 523(a)(6), which excepts any debt for "willful and malicious injury by the debtor to another entity or to the property of another entity." See *ibid.* But even assuming that one or both of those provisions can be read to encompass fraudulent-transfer schemes, Sections 523(a)(4) and 523(a)(6) clearly cover a wide range of *other* illicit conduct. Neither would be rendered superfluous under petitioner's reading of Section 523(a)(2)(A).[8]

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untary made such transfer * * * with actual intent to hinder, delay, or defraud any entity to which the debtor was * * * indebted." 11 U.S.C. 548(a)(1)(A). Like Section 727, Section 548(a)(1)(A) applies only to transfers made within a limited time before a bankruptcy petition is filed. Also like Section 727, Section 548(a)(1)(A) does not speak to the question whether a transferee who has concealed or dissipated the transferred assets, thereby preventing their return to the bankruptcy estate, can obtain a discharge of his debt if he files his own bankruptcy petition.

[8] Because Section 523(a)(4) applies only to actions taken by a debtor in his capacity as a fiduciary, it would not cover most fraudulent-transfer schemes. It is unclear whether Section 523(a)(6) would apply to debts for money or property obtained through a fraudulent-transfer scheme, and the court of appeals found that provision inapplicable here. Pet. App. 17a-19a. The courts of appeals are divided on the question whether a fraudulent-transfer scheme that has the natural and expected effect of injuring a creditor, but is undertaken for the purpose of benefiting the debtor, effects a "willful and malicious injury" within the meaning of Section 523(a)(6). See, *e.g.*, *In re Jennings*, 670 F.3d

In any event, Section 523(a)(2)(A) refers specifically to debts for money or property "obtained by * * * actual fraud." As explained above, the term "actual fraud" has long been understood to encompass schemes that are intended to cheat creditors by transferring assets beyond their reach. The *possibility* that Section 523(a)(4) or (6) might be construed to bar discharge of debts arising out of fraudulent-transfer schemes provides no sound reason for refusing to give the term "actual fraud" its long-accepted meaning.

C. The Court Of Appeals' Narrow Interpretation Of "Actual Fraud" In Section 523(a)(2)(A) Undermines Congress's Balance Of Competing Policy Objectives In The Bankruptcy Code

In enacting the Bankruptcy Code, Congress sought to serve the sometimes competing interests of giving honest debtors a fresh start and assisting creditors in the recovery of at least some portion of their debts. Section 523(a)'s list of debts that are non-dischargeable reflects Congress's determination that "the creditors' interest in recovering full payment of [those] debts * * * outweigh[s] the debtors' interest in a complete fresh start." *Grogan*, 498 U.S. at 287.

This Court's decisions also reflect "an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction." *Kelly* v. *Robinson*, 479 U.S. 36, 49 (1986) (quoting *Bank of Marin* v. *England*, 385 U.S. 99, 103 (1966)). In particular, the Code's "fresh start" policy has much less salience

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1329, 1333 (11th Cir. 2012); *Lawson*, 791 F.3d at 222-224 (1st Cir.); *In re Bammer*, 131 F.3d 788, 792-793 (9th Cir. 1997) (en banc); *In re Saylor*, 108 F.3d 219, 220-221 (9th Cir. 1997). And Section 523(a)(6), unlike Section 523(a)(2)(A), does not apply in Chapter 13 bankruptcies. 11 U.S.C. 1328(a)(2).

when the obligation at issue arises from a debtor's dishonest conduct. See, *e.g.*, *Kelly*, 479 U.S. at 43-53 (finding restitution, as a criminal penalty for welfare fraud, to be non-dischargeable under Section 523(a)(7)); *Grogan*, 498 U.S. at 286-287 (holding that non-dischargeability of particular debts need not be proved by clear and convincing evidence, and explaining that the bankruptcy laws "limit[] the opportunity for a completely unencumbered new beginning to the 'honest but unfortunate debtor'") (quoting *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 244 (1934)); *Brown* v. *Felsen*, 442 U.S. 127, 131-139 (1979) (res judicata did not bar creditor from demonstrating fraudulent conduct under former Section 17(a)(2) in order to prevent discharge of a prior settlement agreement). Construing the term "actual fraud" to encompass the fraudulent-transfer scheme alleged in this case will provide creditors an important protection without burdening the "honest but unfortunate debtor[s]" that the bankruptcy laws are intended to protect.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
SARAH E. HARRINGTON
Assistant to the Solicitor General
MICHAEL S. RAAB
MICHAEL SHIH
Attorneys

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APPENDIX

1. 11 U.S.C. 523 provides in pertinent part:

Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

* * * * *

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing—

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

(C)(i) for purposes of subparagraph (A)—

(I) consumer debts owed to a single creditor and aggregating more than $500 for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief

under this title are presumed to be nondischargeable; and

(II) cash advances aggregating more than $750 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be nondischargeable; and

(ii) for purposes of this subparagraph—

(I) the terms "consumer", "credit", and "open end credit plan" have the same meanings as in section 103 of the Truth in Lending Act; and

(II) the term "luxury goods or services" does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor;

* * * * *

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

* * * * *

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

* * * * *

2. 11 U.S.C. 548(a)(1) provides:

Fraudulent transfers and obligations

(a)(1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or

(IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit

of an insider, under an employment contract and not in the ordinary course of business.

3. 11 U.S.C. 727(a)(2) provides:

Discharge

(a) The court shall grant the debtor a discharge, unless—

* * * * *

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

4. Tex. Bus. & Comm. Code Ann. § 24.005(a)(1) (West 2015) provides:

Transfers Fraudulent as to Present and Future Creditors

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or within a reasonable time after the transfer was made or the obligation was in-

curred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

5. Tex. Bus. Orgs. Code Ann. § 21.223 (West 2012) provides:

Limitation of Liability for Obligations

(a) A holder of shares, an owner of any beneficial interest in shares, or a subscriber for shares whose subscription has been accepted, or any affiliate of such a holder, owner, or subscriber or of the corporation, may not be held liable to the corporation or its obligees with respect to:

(1) the shares, other than the obligation to pay to the corporation the full amount of consideration, fixed in compliance with Sections 21.157-21.162, for which the shares were or are to be issued;

(2) any contractual obligation of the corporation or any matter relating to or arising from the obligation on the basis that the holder, beneficial owner, subscriber, or affiliate is or was the alter ego of the corporation or on the basis of actual or constructive fraud, a sham to perpetrate a fraud, or other similar theory; or

(3) any obligation of the corporation on the basis of the failure of the corporation to observe any corporate formality, including the failure to

(A) comply with this code or the certificate of formation or bylaws of the corporation; or

(B) observe any requirement prescribed by this code or the certificate of formation or bylaws of the corporation for acts to be taken by the corporation or its directors or shareholders.

(b) Subsection (a)(2) does not prevent or limit the liability of a holder, beneficial owner, subscriber, or affiliate if the oblige demonstrates that the holder, beneficial owner, subscriber, or affiliate caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the holder, beneficial owner, subscriber, or affiliate.